IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

BRANDON RAY SMITH,	§	
	§	
Petitioner,	§	
	§	
v.	§	No. 4:13-CV-101-A
	§	(Consolidated with
WILLIAM STEPHENS, Director,[1]	§	No. 4:13-102-A)
Texas Department of Criminal	§	
Justice, Correctional	§	
Institutions Division,	§	
	§	
Respondent.	§	

MEMORANDUM OPINION
and
ORDER

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 filed by petitioner, Brandon Ray Smith, a state prisoner confined in the Correctional Institutions Division of the Texas Department of Criminal Justice (TDCJ), against William Stephens, Director of TDCJ, respondent. After having considered the pleadings, state court records, and relief sought by petitioner, the court has concluded that the petition should be denied.

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[1]William Stephens succeeded Rick Thaler as the Director of the Correctional Institutions Division of the Texas Department of Criminal Justice. Pursuant to Rule 25 of the Federal Rules of Civil Procedure, Director Stephens "is automatically substituted as a party." *See* Fed. R. Civ. P. 25(d).

A. FACTUAL AND PROCEDURAL HISTORY

The state appellate court summarized the procedural and factual background of this case as follows:

> A grand jury indicted Appellant for two counts of aggravated assault with a deadly weapon. The indictments collectively alleged that Appellant intentionally or knowingly threatened imminent bodily injury to Gary and Randolph (Randy) Osburg and that Appellant used or exhibited a truck as a deadly weapon during the commission of the assaults. The indictments also alleged that Appellant had a previous felony conviction. Appellant pleaded not guilty to both counts, was tried in October 2008, and the jury found [him] guilty of both counts. During the punishment phase of his trial, Appellant pleaded true to the repeat offender notice in the indictments. The jury found the enhancement to be true and assessed Appellant's punishment at thirteen years' confinement for each count; the trial court ordered Appellant's sentences to run concurrently. . . .
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> Randy Osburg testified at trial that he took his son, Gary Osburg, to a convenience store in Tarrant County, Texas, on February 11, 2008, to buy some cigarettes. As they were leaving the store, Randy and Gary saw Appellant and his female companion, Banu Kurt, involved in what they believed was an altercation; they saw Appellant hit Ms. Kurt twice in the chest with a closed fist. After the second hit, Ms. Kurt moved backward, hit the gas pump, and fell down. Sitting in Appellant's truck were two children Randy believed were between three and six years old; one of them was crying.
>
> Gary further testified that, upon seeing the second hit, he got out of Randy's truck to help Ms. Kurt and to confront Appellant. As Gary approached Appellant, Appellant pulled brass knuckles from his pocket and told Gary to mind his own business. Gary and Randy started "mov[ing] around" Appellant, and

although they did not "jump on" him, Appellant ran around the building and away from them.

Randy yelled for someone to call the police, and Appellant jumped into his truck and "acted like he was going to leave." Randy started talking to Ms. Kurt, but something in Ms. Kurt's expression made Randy turn around. Randy then saw Appellant driving straight at him. When Randy heard Appellant accelerate, Randy jumped into the bed of Gary's truck; Randy testified that he was afraid of dying or being badly hurt. Appellant then circled the gas pump and drove straight at Gary; Gary testified that he believed Appellant was trying to kill him, and Randy testified that he was afraid Appellant was going to kill Gary. When Gary saw Appellant driving at him, he grabbed a hammer from Randy's truck and threw it at Appellant, hitting the truck's windshield. Appellant slammed on the brakes, got out of his truck "in a complete rage," and ran after Gary while his truck was still moving. Appellant's unoccupied truck rolled across the street and came to rest against a sign and a telephone pole.

Appellant then chased Gary around the convenience store on foot. Gary came out from the back of the convenience store and got into Randy's truck, and Gary and Randy drove away from the store. Appellant ran across the street to his truck and followed Gary and Randy. Randy testified that he drove away from the convenience store and turned right on a street two or three blocks away. As he and Gary approached a stop sign after turning right, Gary said, "He's behind us. He's going to ram us." Randy looked in his mirror and saw Appellant's truck "coming at [them] fast."

Randy said that he accelerated and "got maybe a little bit across the street when Appellant hit us." Randy testified that he accelerated again and believed he was driving sixty or seventy miles-per-hour when Appellant "rammed [him] two or three more times." Randy testified that Gary had retrieved his hammer from the convenience store parking lot and was leaning out the truck window as they drove to throw the hammer at

Appellant "to slow him down." Randy also testified that he was afraid Appellant would push them into traffic at an upcoming intersection. Randy said that he then slammed his brakes and that Appellant also slammed his brakes, avoiding a collision. When traffic on the cross-street was clear, Randy accelerated again but Appellant approached them in the outside lane. Gary said, "He's going to ram you," and Randy again slammed his brakes. Randy testified that Appellant "ended up going across our lane, trying to ram us from the side, but luckily, he just barely missed me." Randy said that Appellant's truck crossed some railroad tracks, "went into the air," and stopped in a ditch.

Gary testified that he was scared and his adrenaline was going when they drove away from the convenience store. Gary testified that while Randy drove, Gary looked out the window and saw Appellant get into his truck and follow them. Gary said less than fifteen seconds passed before Appellant "was already up on us," tailgating them. Gary testified that Appellant "ended up striking" the rear of Randy's truck three times, jarring Randy and Gary. As Randy approached a T-intersection, Randy turned right and Appellant followed. Gary testified that he "saw Appellant coming up on us really fast and I told my dad to get over into the next lane and stop and hit his brakes. And when he did, Appellant was coming at us, barely missed us, and went into a ditch."

Randy testified that after Appellant drove into the ditch, he and Gary drove back to the convenience store, hoping the police had arrived by that time. The police were there and noted damage to the bumper on Randy's truck, but no photographs were taken. Randy said he was somewhat able to repair the dent in the bumper by tying it to a tree and pulling it out. The police also noted front-end damage to Appellant's truck, but the officer did not recall noticing any damage to the windshield.

During cross-examination, Randy acknowledged that he had joked with someone after the altercation that he

> would gladly have the case dropped and all charges dismissed if Appellant would meet Gary for a one-on-one fight. Randy also admitted that he "forgot" to tell the jury that he also had a weapon during the altercation-a tile cutter he had gotten from the bed of his truck.
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> Tricia Nyamongo Walton, the clerk from the convenience store, testified that she saw Appellant, a woman, and two other men standing behind a white truck. She saw Appellant drive the white truck around the store, and she told police that Appellant was "driving crazy," almost ran into the building, the gas pumps, and her car. She also told police that Appellant chased the other men with his truck.
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> Ms. Kurt testified for the defense that she and Appellant were not fighting but were instead "just playing around." She said that Appellant pushed her but that she tripped over the gas pump. Ms. Kurt did, however, tell the police that Appellant hit her in the face. She testified that as Randy and Gary approached Appellant, she gathered her children, ages ten and eight, and went into the convenience store. She said that she did not see what was thrown at Appellant's truck but that she did see damage to the windshield. She also testified that she did not see Appellant drive toward anyone.

Op. 120-25, *Ex parte Smith*, No. WR-78,214-01, ECF No. 15-3.

The appellate court affirmed the trial court's judgments, and the Texas Court of Criminal Appeals refused petitioner's petitions for discretionary review. *Smith v. State*, PDR Nos. 1142-10 & 1143-10, ECF Nos. 13-1 & 14-6. Petitioner also filed a state habeas application relevant to this federal petition, which was denied by the Texas Court of Criminal Appeals on the findings

and conclusions of the trial court without written order.[2] Order, *Ex parte Smith*, No WR-78,214-01, ECF No. 16-3.

B. ISSUES

Generally, petitioner raises the following grounds for relief:

(1) He received ineffective assistance of trial counsel;

(2) The trial court abused its discretion in refusing to appoint new counsel;

(3) The trial court violated his professional code by allowing a certain voir dire member to serve as a member of the jury;

(4) He received ineffective assistance of appellate counsel; and

(5) He is actually innocent of the offense.

Pet. 7-8A, ECF No. 1; Pet'r's Mem. of Law 2-4, ECF No. 2.

C. RULE 5 STATEMENT

Respondent believes that petitioner has sufficiently exhausted his state court remedies as to the claims presented, although he believes one is procedurally barred, and that the petition is neither barred by limitations nor successive. Resp't

[2]The Texas Court of Criminal Appeal adopted the trial court's findings and conclusions of law, except for finding #34, which reads "Mr. Pearson did not file a motion for change of venue because he found factual basis for a change of venue." Findings of Fact 98, ECF No. 16-4.

Ans. 7, ECF No. 21.

D. DISCUSSION

Legal Standard for Granting Habeas Corpus Relief

A § 2254 habeas petition is governed by the heightened standard of review provided for by the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Under the Act, a writ of habeas corpus should be granted only if a state court arrives at a decision that is contrary to or an unreasonable application of clearly established Supreme Court precedent or that is based on an unreasonable determination of the facts in light of the record before the state court. *Harrington v. Richter,* 131 S. Ct. 770, 785 (2011); 28 U.S.C. § 2254(d)(1)-(2). This standard is difficult to meet and "stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings." *Harrington*, 131 S. Ct. at 786.

The Act further requires that federal courts give great deference to a state court's factual findings. *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000). Section 2254(e)(1) provides that a determination of a factual issue made by a state court shall be presumed to be correct. The applicant has the burden of rebutting the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Typically, when the Texas

Court of Criminal Appeals denies relief in a state habeas corpus application without written order, it is an adjudication on the merits. *Barrientes v. Johnson*, 221 F.3d 741, 779-80 (5th Cir. 2000); *Ex parte Torres*, 943 S.W.2d 469, 472 (Tex. Crim. App. 1997).

In this case, the state habeas court entered express findings of fact refuting petitioner's claims, which he has failed to rebut with clear and convincing evidence, and the Texas Court of Criminal Appeals adopted those findings, save for one, and denied habeas relief without written order. Order 1-2, *Ex parte Smith*, NO. WR-78,214-01, ECF No. 16-3. Under these circumstances, a federal court must defer to the state habeas court's factual findings and may assume the Texas Court of Criminal Appeals applied correct standards of Supreme Court precedent to the facts, unless there is evidence that an incorrect standard was applied. *Townsend v. Sain*, 372 U.S. 293, 314 (1963)[3]; *Catalan v. Cockrell*, 315 F.3d 491, 493 n.3 (5th Cir. 2002); *Valdez v. Cockrell*, 274 F.3d 941, 948 n.11 (5th Cir. 2001); *Goodwin v. Johnson*, 132 F.3d 162, 183 (5th Cir. 1997).

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[3]The standards of *Townsend v. Sain* have been incorporated into 28 U.S.C. § 2254(d). *Harris v. Oliver*, 645 F.3d 327, 330 n.2 (5th Cir. 1981).

(1) Ineffective Assistance of Trial Counsel

Under his first and fourth grounds, *see infra*, petitioner claims he received ineffective assistance of court-appointed trial and appellate counsel. Petitioner was represented by David A. Pearson IV at trial and by Lisa Mullen on appeal.

A criminal defendant has a constitutional right to the effective assistance of counsel at trial and on a first appeal as of right. U.S. CONST. amend. VI, XIV; *Evitts v. Lucey*, 469 U.S. 387, 393-95 (1985); *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Anders v. California*, 386 U.S. 738, 744 (1967). An ineffective assistance claim is governed by the familiar standard set forth in *Strickland v. Washington*. 466 U.S. at 668. *See also Styron v. Johnson*, 262 F.3d 438, 450 (5th Cir. 2001) (applying the *Strickland* standard to ineffective assistance claims against appellate counsel). To establish ineffective assistance of counsel a petitioner must show (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that but for counsel's deficient performance the result of the proceeding would have been different. *Strickland*, 466 U.S. at 688.

A court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional

assistance or sound trial strategy. *Id.* at 668, 688-89. Judicial scrutiny of counsel's performance must be highly deferential and every effort must be made to eliminate the distorting effects of hindsight. *Id.* at 689; *Harrington*, 131 S. Ct. at 788. Where, as here, a petitioner's ineffective assistance claims have been reviewed on their merits and denied by the state courts, federal habeas relief will be granted only if the state courts' decision was contrary to or involved an unreasonable application of the standard set forth in *Strickland*. *Bell v. Cone*, 535 U.S. 685, 698-99 (2002); *Santellan v. Dretke*, 271 F.3d 190, 198 (5th Cir. 2001). The Supreme Court recently emphasized in *Harrington* the way that a federal court is to consider an ineffective assistance of counsel claim raised in a habeas petition subject to AEDPA's strictures:

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

Harrington, 131 S. Ct. at 785 (quoting *Williams v. Taylor*, 529 U.S. 362, 410 (2000)).

Petitioner claims trial counsel was ineffective because he-

(1) failed to investigate the scene, take photos of the alleged crime scene, tire tread marks, or otherwise pursue evidence to contradict the complainants' testimony as to what happened,

(2) failed to secure convenience store surveillance video of the alleged crime, to produce the video or to subpoena it for trial,

(3) failed to locate and interview crucial witness whose testimony would have contradicted what the complainants testified to at trial,

(4) refused to let him testify at trial,

(5) failed to investigate a possible conspiracy against him where it's possible he was set-up or framed by a certain individual,

(6) failed to file a motion for change of venue,

(7) failed to inquire further of a venire member who knew and/or worked for the prosecutor, whom the prosecutor knew would be unfair and biased,

(8) failed to investigate, interview and call witnesses, subpoena evidence, destroyed the only defense he had that would have more fully advanced his defense, and

(9) failed in doing all of the above.

Pet. 7-8A, ECF No. 1.

Trial counsel, who is board certified in criminal law, filed an affidavit and supporting documentation in the state habeas

proceeding responding to petitioner's allegations in relevant part as follows:

> Smith contends that Counsel was deficient for failing to locate or interview the witness, Josh Smith. Counsel knew that Josh Smith was an important witness to interview. Counsel knew about Witness Smith from multiple discussions and written statements from Applicant Smith. Applicant Smith wrote to Counsel, "I have witnesses. A man named Josh Smith and his wife were standing outside on their porch when I was ran off the road. . . Josh Smith's phone #(817)903-9530." Counsel directed the private investigator, Jane Brownlee, who was appointed to assist me, to call Josh Smith and interview him. Counsel first called Josh Smith and spoke to him and verified that the phone number given to me was correct. Counsel determined from my interview with Josh Smith that neither he nor his wife witnessed what Applicant Smith suggested they witnessed. Josh Smith did not see Applicant in any way forced off the road by the complainants. Witness Smith saw Applicant's vehicle in the roadside and nothing more. Counsel determined that Josh Smith was not helpful, and, in my estimation, he would serve to corroborate the complainants' account.
>
> Nonetheless, I still directed the private investigator to interview Witness Smith in abundance of caution as to whether he had not been forthcoming with me. Jane Brownlee met with Josh Smith at his house and together they drove to the spot on the road where Applicant Smith's vehicle wrecked into a roadside ditch. Brownlee reported to me after the interview that Witness Smith was not helpful to our defense, and that he was reluctant to be questioned and especially reluctant if forced to testify.
>
> Smith contends that Counsel was deficient for failing to investigate the crime scene and pursue evidence contradicting complainant's testimony. Counsel drove to the offense location and inspected the convenient store and the parking lot for any helpful

evidence. Counsel did not discover "tire markings" in the parking lot that were linked to the offense. In fact, Counsel recalls from the trial that he specifically impeached the investigating officers for failing to recover or photograph evidence of tire marking. Counsel then argued to the jury this failure to properly investigate as a basis for reasonable doubt.

At his inspection of the offense location, Counsel stood inside the store to observe the offense location in the parking lot to gain the perspective of any witness who observed the incident from inside the store. Besides the offense location, Counsel also observed where the Applicant's vehicle was wrecked and observed and noted the distance from the offense location to Applicant's home where he was arrested on the incident date. Counsel's file contains MapQuest printed directions and a note referencing time spent driving to various locations related to the offense. . . .

Counsel also directed private investigator to interview the store clerk, Tricia Nyamongo, who was named "Witness 1" in the offense report. Counsel did this specifically because "Witness 1" supposedly saw everything, and Counsel wanted to check whether her story had been embellished by the police report. Counsel directed the interview with her because Counsel wanted to know if there was any chance that the Witness had been influenced by the police or the complainants after they returned to the convenience store/gas station. Counsel specifically wanted to discover if "Witness 1" could in fact tell us if the complainants were in any way the aggressive or assaultive actors in the incident. Brownlee was successful in interviewing "Witness 1" and unfortunately discovered that her account would be extremely harmful to the defense. Brownlee provided a report to Counsel regarding her interview with "Witness 1".

Smith contends that Counsel was deficient for failing to secure surveillance videotape of the alleged

crime. Counsel sought out any and all available photographic, digital, or physical extant evidence, including surveillance of the alleged incident. First of all, Tarrant County District Attorney's Office has an open file policy. It has always been Counsel's experience that the Tarrant DA Office is willing to share any extant case-related photographic or media evidence, including surveillance footage. Counsel inquired of the prosecutors handling the case whether all photographic, digital or recorded evidence had been provided. Counsel does not believe that any surveillance footage existed. Second, Counsel's request for "recordings and transcriptions thereof of all information and evidence obtained by means of electronic eavesdropping, surveillance, . . ." was filed, heard and granted in his *Motion for Discovery*, subparagraph 17.

Smith contends that Counsel was deficient for refusing to allow Smith to testify. This statement by Smith is false. Counsel explained to Smith that the privilege to testify or choose not to testify is his individual right guaranteed by the United States Constitution. Counsel explained to Smith that his decision whether or not to testify at either the guilt/innocence phase or punishment phase would be honored. Counsel stressed to Smith that Smith's right to testify could not be overridden by any opinion of his lawyer. Counsel had practiced for over 17 years at the time of Smith's trial, nearly exclusively in criminal defense. Counsel has tried many cases in his career and never once failed to appreciate, advise, and respect a client as to his or her personal choice on whether he or she testified in their own defense.

Smith contends that Counsel was deficient for failing to investigate a possible conspiracy against him. Counsel discovered no potentially credible basis to believe a conspiracy existed that resulted in Smith's arrest or prosecution. Counsel had no credible basis to believe that a financially motivated third party had the means or opportunity to somehow generate motivation and collusion on the part of the

complainants and the store clerk to falsely report an offense and commit perjury in court. Further, Counsel had no credible basis to believe a fabricated criminal prosecution against Smith in particular could somehow lead to a potential financial gain for this third party.

Smith contends that Counsel was deficient for failing to present all evidence helpful to the defense. Counsel believes the trial record supports that he presented all available evidence helpful to the defense. Counsel located a witness, J. Kirk Fraley, who provided information Counsel used in trial to impeach the complainant, Randy Osburg. Randy Osburg made the statement to Fraley that he would drop the charges if Applicant Smith would meet him to fight one on one.

Counsel also attained a written statement from Banu Kurt, Smith's girlfriend who at the scene wrote a statement for police that, "Smith hit me on the face and 2 men started to fight with him to help." Smith directed his private investigator to interview Banu Kurt, who Counsel understood was ready to give a version more supportive of Smith. Banu Kurt did give a statement that was helpful to the defense. Consequently, Counsel called Kurt as a witness for Smith, and Kurt did testify that Smith and she were only playing around, and he had not assaulted her as suggested by the complainants. Kurt also testified favorably that she did not see Smith drive his vehicle toward anyone.

Counsel also presented evidence helpful to Smith in the punishment phase by calling a witness who testified to Smith's good work habits and skills. Counsel recalls that he called Robert Thomas of Three Way Fence/Three Way Welding. Thomas touted Smith's work ethic, that Smith had achieved a welder's certificate, and that he valued Smith as an assistant. Smith was a repeat offender, who faced 5-99 years or lifetime confinement. He received thirteen (13) years, a punishment in the lower range, which Counsel believes

was due in part to the mitigating evidence presented.

Smith contends that Counsel was deficient for making statements implying his belief in Smith's guilt. This is a false statement. It is not Counsel's role to decide "guilt", that is the job of the Judge or a Jury. Counsel had several discussions with Smith regarding Counsel's understanding from his own investigation of the evidence we could expect to hear and see at trial. Counsel believes he fulfilled his obligations with Smith to fully discuss all the facts and circumstances regarding the case. Counsel also discussed the case with Smith and received Smith's written summaries of alleged witness accounts, in order to understand Smith's version of the incident. Counsel exhaustively sought out all evidence he could establish that might support Smith's version.

Smith contends that Counsel was deficient for failing to inquire further about a venire member who knew the prosecutor. The venire member worked at a law firm with Assistant District Attorney Kirk Stallings. Undersigned Counsel recalls this exact exchange with this venire member but did not believe her statements yielded sufficient potential basis, even on further questioning, for a challenge for cause. However, in order to protect Smith against the potential bias from this venire member, Counsel utilized a peremptory challenge to prevent her from serving on the jury.

Undersigned Counsel does not believe he was ineffective in preparing to try or in trying this lawsuit.

Aff. 67-74, ECF No. 16-4.

The state habeas court found counsel's affidavit credible and supported by the record and entered detailed findings consistent with the affidavit. Findings of Fact 95-102, ECF No. 16-4. Based on those findings, and applying the *Strickland*

standard, the court concluded that counsel adequately and independently investigated the case, fully and adequately prepared for trial, made reasonable decisions regarding the calling and examination of witnesses and regarding the voir dire examination, and functioned as counsel guaranteed by the Sixth Amendment. The court further concluded that no grounds existed for counsel's removal and that, even if petitioner could show deficient performance, he had failed to show a reasonable probability that, but for counsel's acts of misconduct, the result of his trial would have been different. Conclusions of Law 102-03, ECF No. 16-4.

Petitioner presented no argument or credible evidence in state court or this federal habeas action that could lead the court to conclude that the state courts unreasonably applied *Strickland* based on the evidence presented in state court. 28 U.S.C. § 2254(d). Petitioner's claims are largely conclusory or speculative with no legal or evidentiary basis, contradicted by the record, or involve strategic decisions by counsel, which are either insufficient to raise a constitutional issue and/or outside this court's preview on federal habeas review. *See Strickland,* 460 U.S. at 689 (holding strategic decisions by counsel are virtually unchallengeable and generally do not

provide a basis for post-conviction relief on the grounds of ineffective assistance of counsel); *Woodfox v. Cain*, 609 F.3d 774, 808 (5th Cir. 2010) (providing "[c]laims of uncalled witnesses are not favored on federal habeas review because the presentation of witnesses is generally a matter of trial strategy and speculation about what witnesses would have said on the stand is too uncertain"); *Green v. Johnson*, 160 F.3d 1029, 1042 (5th Cir. 1998) (holding conclusory arguments are insufficient to support claim of ineffective assistance); *Koch v. Puckett*, 907 F.2d 524, 530 (5th Cir. 1990) (concluding that "counsel is not required to make futile motions or objections); *United States v. Green*, 882 F.2d 999, 1003 (5th Cir. 1989) (providing "[a] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial").

Overall, trial counsel devised a defense, filed pretrial motions and participated in pretrial hearings, conducted voir dire, gave opening argument, made meritorious objections and motions during trial, cross-examined state witnesses, and gave closing argument. A petitioner is required to demonstrate that counsel's performance, in light of the entire proceeding, was so

inadequate as to render his trial unfair. *Washington v. Watkins*, 655 F.2d 1346, 1355 (5th Cir. 1981). Having reviewed the entirety of the record, counsel's performance was not outside the wide range of professionally competent assistance.

(2) and (3) Trial Court Error

Petitioner claims the trial court abused its discretion by refusing to appoint new counsel where there was a conflict between him and his trial counsel. Pet. 7, ECF No. 1; Pet'r's Mem. of Law 20-21, ECF No. 2. The record reflects that shortly before his trial was to commence, petitioner sent a letter to the trial judge wherein he asserted-

> I am writing because I would like to fire my attorney (David Pearson). Mr. Pearson and I have major conflicts of interest concerning my cases (2 agg. assaults). I have asked him again and again, since day one, to file a certain couple of motions and he has yet to produce any paperwork whatsoever. I am starting to feel he himself is out to get me. He tells me that yes, he did in fact file those motions that I asked for back in June but just keeps on forgetting to give me the paperwork that I desperately need in order to be able to help defend my cases. I feel utterly and completely exhausted in this battle of attorney verse [sic] client. Can you please find it in your heart to help me out in this matter. I need an attorney that will help me. Thank you very much!

Clerk's R. 71-73, ECF No. 16-2.

In response to the letter, counsel filed a motion to withdraw on October 20, 2008, two days before trial. Clerk's R.

71, ECF No. 16-2; Reporter's R. vol. 2, ECF No. 14-4. At the hearing on the motion, petitioner stated to the court that he and counsel "had disagreements from day one, where there's a communication barrier and breakdown," that "there were some trust issues involved," that there was "a whole bunch of issues that have come into play," and that he had asked counsel "to check on these people's criminal records and stuff like this way back at the beginning of all this." Petitioner stated he also felt that the trial "had been kind of rushed" and that "when it comes to my case, maybe [counsel] hasn't had time, maybe he's been busy, or, I don't know, I don't know what the situation is. I just feel that, you know, he hasn't been able to give my case the time . . . ." *Id.* at 12-13. The trial court explained that petitioner's "feelings" were irrelevant, and, absent any legal or factual basis warranting "removal" of counsel, denied counsel's motion to withdraw. *Id.* at 30. The state habeas court also found that there was no factual basis for removal of counsel and, given that "[n]o grounds existed for the removal," recommended denial of the claim. The Texas Court of Criminal Appeals denied relief on the trial court's findings. Findings of Fact and Conclusions of Law 102-74, ECF No. 16-4; Order 1-2, ECF No. 16-3.

Petitioner presented no credible evidence that trial

counsel's representation was deficient due to an actual conflict or that petitioner was prejudiced by any conflict. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance. *Mickens v. Taylor,* 535 U.S. 162, 172 n.5 (2002). Petitioner contends-

> appointed attorney refused to do anything he asked him, to investigate his case, interview Josh Smith and call him to the trial, wouldn't agree to let the Applicant testify on his own behalf, failed to establish a working relationship with him, implied the Applicant was guilty, wouldn't try to obtain the store video of the entire alleged assault, there was a failure to listen to the Applicant at all in regards to how Applicant wanted the appointed attorney to conduct his case.

Pet'r's Mem. of Law 21, ECF No. 2.

Such conclusory allegations, unsupported in, or refuted by, the record, are insufficient to establish adverse performance by counsel. *Perillo v. Johnson,* 205 F.3d 775, 781 (5th Cir. 2000). A defendant's mere dissatisfaction or disagreement with his attorney's strategy does not give rise to a conflict. *United States v. Fields,* 483 F.3d 313, 353 (5th Cir. 2007); *Moreno v. Estelle,* 717 F.2d 171, 175 (5th Cir. 1983). Nor does the Sixth Amendment right to counsel guarantee an accused a "meaningful attorney-client relationship." *Morris v. Slappy,* 461 U.S. 1, 14 (1983). Because petitioner failed to establish a conflict that adversely affected counsel's performance, there was no abuse of

discretion on the part of the trial court.

Petitioner also claims the trial court violated its "Professional Code" by allowing a "voir dire member" who had a prior working relationship with the state prosecutor to serve on the jury. Pet. 7, ECF No. 1. Respondent asserts this claim was not raised on direct appeal by petitioner and, thus, was procedurally defaulted in state court and, in turn, is procedurally barred on federal habeas review. Resp't's Ans. 17-18, ECF No. 21. The state habeas court, however, did not expressly rely on the procedural bar when addressing the issue. Findings of Fact and Conclusions of Law 104-05, ECF No. 16-4. Nevertheless, the potential juror in question did not serve on the jury because trial counsel exercised a peremptory challenge against her. Findings of Fact and Conclusions of Law 104-05, ECF No. 16-4. Therefore, this claim is factually incorrect and frivolous.

(4) Ineffective Assistance of Appellate Counsel

Petitioner claims appellate counsel was ineffective by failing to raise on appeal the claims he presents herein, points of error he asserts would have entitled him to a reversal of his conviction, and by failing to discuss the evidence and refer to the record in greater detail. Pet. 8 , ECF No. 1; Pet'r's Mem.

of Law 25-26, ECF NO. 2. Appellate counsel responded to the allegations in her affidavit as follows:

> Pursuant to the allegations in the Writ of Habeas Corpus . . ., I am providing the following information:
>
> I aggressively and diligently represented Mr. Smith in his appeal and used my best legal judgment and strategy throughout the appellate proceedings. I raised every legal attack that was preserved and had a legal basis to raise. I, as I do in every appeal case, read the entirety of the record three times to discern any errors or develop any legal challenges to his trial. I raised every legal challenge that was preserved and that had a basis in argument and law in my brief.
>
> Specifically, Applicant challenges the fact I did not raise ineffective assistance of counsel on the direct appeal. I specifically did not raise this issue on appeal as the law is very clear that, to win such an argument, the record must demonstrate trial counsel's explanation and possible strategic motivation for his trial conduct. This record does not reflect this so we could not win this claim on direct appeal. This fact was explained to Applicant many times. To raise it and loose [sic] it would also constitute waiver of the issue which could be attacked on a writ, so I was actually trying to protect Applicant in not raising this issue.
>
> Applicant also complains that I did not raise the issue of trial counsel not challenging for cause a specific juror. If trial counsel did not challenge the juror, I obviously could not win this issue on appeal as it was not preserved. When an issue is not preserved, I will not raise it on appeal.
>
> In summary, in Mr. Smith's appeal, I raised every issue that I, in my best legal judgment, fact and law as a possible point of error on appeal.

Aff. 90-91, ECF No. 16-4.

The state habeas court found counsel's affidavit credible and supported by the record and entered findings consistent with the affidavit, including findings that counsel directed the appellate court to the appropriate record citations and pertinent state law and that counsel's decisions as to the issues to raise and not to raise on appeal was a matter of reasonable professional judgment. Based on those findings, and applying the *Strickland* standard, the court concluded that appellate counsel provided petitioner with effective assistance on appeal. The court further concluded that there was no reasonable probability that the outcome of the appeal would have been different had counsel or another counsel handled it differently and recommended relief be denied. Findings of Fact and Conclusions of Law 106-09, ECF No. 16-3. The Texas Court of Criminal Appeals denied relief based on the trial court's findings.

Petitioner presented no argument or credible evidence in state court or this federal habeas action that could lead the court to conclude that the state courts unreasonably applied the standard set forth in *Strickland* based on the evidence presented in state court. 28 U.S.C. § 2254(d). As noted by the state habeas court, appellate counsel is not required to raise every conceivable argument urged by his client on appeal, regardless of

merit. *Smith v. Robbins*, 528 U.S. 259, 287-88 (2000). It is counsel's duty to choose among potential issues, according to his or her judgment as to their merits and the tactical approach taken. *Jones v. Barnes*, 463 U.S. 745, 749 (1983). Petitioner fails to raise any meritorious claims in this petition. Prejudice does not result from appellate counsel's failure to assert meritless claims or arguments. *See United States v. Wilkes*, 20 F.3d 651, 653 (5th Cir. 1994). Thus, it follows, that counsel was not ineffective for failing to raise petitioner's claims on appeal.

(5) Actual Innocence

Finally, petitioner claims he is actually innocent of the offenses because he had a right to defend himself. The Supreme Court has not recognized actual innocence as a free standing ground for habeas relief. *United States v. Scruggs*, 691 F.3d 660, 671 (5th Cir. 2012). Thus, this claim is not an independently cognizable federal-habeas claim. *Foster v. Quarterman*, 466 F.3d 359, 367 (5th Cir. 2006).

Evidentiary Hearing

Petitioner requests an evidentiary hearing, however his claims were adjudicated on the merits in state court, and he has failed to overcome the limitation of § 2254(d)(1) on the record

that was before the state court. *Cullen v. Pinholster*, – U.S. –, 131 S. Ct. 1388, 1398-1401 (2011). Thus, no evidentiary hearing is warranted.

For the reasons discussed herein,

The court ORDERS the petition of petitioner for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 be, and is hereby, denied.

Pursuant to Rule 22(b) of the Federal Rules of Appellate Procedure, Rule 11(a) of the Rules Governing Section 2254 Cases in the United States District Court, and 28 U.S.C. § 2253(c), for the reasons discussed herein, the court further ORDERS that a certificate of appealability be, and is hereby, denied, as petitioner has not made a substantial showing of the denial of a constitutional right.

SIGNED July 2, 2014.

JOHN MCBRYDE
UNITED STATES DISTRICT JUDGE